PROTECTING INTERNAL REPORTERS AFTER *DIGITAL REALTY TRUST, INC. V. SOMERS*

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Abstract

The Supreme Court, in Digital Realty Trust, Inc. v. Somers, held that employees who only report securities law violations or fraudulent practices internally are not whistleblowers and therefore do not qualify for whistleblower anti-retaliation protection under the Dodd-Frank Act. Thus, the Supreme Court has foreclosed anti-retaliation protection for employees that only report internally under the Dodd-Frank Act. While this result is correct strictly on the basis of statutory interpretation, it does not mean that employees that only make internal reports are not deserving of anti-retaliation protection. In fact, since both employers and employees are incentivized to promote internal reporting, it is more likely that potential securities violations or fraudulent practices are reported internally. Even though anti-retaliation protection of internal reporters is no longer found in the Dodd-Frank Act, such protection may potentially be found internally if the employer has a robust system of self-regulation headed by an independent Chief Compliance Officer.

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I. Introduction

On February 21, 2018, the Supreme Court of the United States decided on *Digital Realty Trust, Inc. v. Somers*.[1] This decision finally resolved the circuit split on whether an employee who only reports securities law violations or fraudulent practices internally, and not externally to the Securities and Exchange Commission (SEC), qualifies as a "whistleblower" for whistleblower anti-retaliation protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[2] The Supreme Court, interpreting the statute, held that employees who only report securities law violations or fraudulent practices internally are not whistleblowers and therefore do not qualify for whistleblower anti-retaliation protection under the Dodd-Frank Act.[3] Thus, the Supreme Court has foreclosed anti-retaliation protection for employees that only report internally under the Dodd-Frank Act.

While this result is correct strictly on the basis of statutory interpretation, this note makes the argument that employees that only make internal reports are just as deserving of anti-retaliation protection

[1] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).
[2] 15 U.S.C. § 78u-6 (2012).
[3] *Somers*, 138 S. Ct at 778 (finding that Somers did not qualify as a whistleblower under the term's provisional definition because he did not provide his information to the Commission before his termination).

as those that report externally to the SEC, and such protection may potentially be found internally if the employer has a robust system of self-regulation. Section II will provide the case law and statutory background of anti-retaliation protection for whistleblowers and internal reporters. Section II will first examine the Supreme Court decision in *Digital Realty Trust, Inc. v. Somers* as well as the prior circuit split that led to this decision. Section II will then examine the Dodd-Frank Act and the Sarbanes-Oxley Act (SOX Act) as they pertain to anti-retaliation protection for whistleblowers and internal reporters, as well as the difficulties encountered in attaining anti-retaliation protection under the SOX Act. After the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, only the SOX Act remains available to provide anti-retaliation protection for employees who only reported securities law violations or fraudulent practices internally. The many hurdles of the SOX Act, especially the length of the statute of limitations, the inability of the complainant to initially bring an action directly to a district court, and the stringent interpretation of what counts as protected activity, shows the difficulty of attaining anti-retaliation protection under the SOX Act. Section III critiques suggestions to revise the Dodd-Frank Act to continue to allow anti-retaliation protection for internal reporters in light of *Digital Realty Trust, Inc. v. Somers*. The suggestions, while smart, are incompatible with the purpose of the Dodd-Frank Act, which is to promote reporting to the SEC. Section IV examines the importance of promoting internal reporting and makes the argument that employees who only make internal reports are just as deserving of anti-retaliation protection. Section V argues that anti-retaliation protection for internal reporters can be created internally if the employer has a robust system of self-regulation. While a corporation is set up to only conduct itself in a lawful manner, misconduct often arises due to the actions of a few. Section V examines the role of the Chief Compliance Officer (CCO) in contrast to the role of the General Counsel (GC) and other in-house lawyers with regard to protecting internal reporters from retaliation. Unlike in-house lawyers, who must act in the best interest of their client—the corporation, the SEC has suggested that compliance officers have an additional duty to protect public investors. The arguments proposed in this paper support the notion that a corporation's CCO may serve as the backbone of a robust self-regulatory system that ensures protection against retaliation of employees who make internal reports.

II. Anti-retaliation Protection for Whistleblowers: Case Law and Statutory Background

Before the Supreme Court determined that internal reporters do not fit the whistleblower definition under the Dodd-Frank Act and thus are not afforded anti-retaliation protection under the Dodd-Frank Act, three Circuit Courts below were divided on this issue. This section discusses how the Supreme Court and Circuit Courts made their determinations and, in light of the Supreme Court's ruling in *Digital Realty Trust, Inc. v. Somers*, what federal anti-retaliation protection is left for internal reporters.

A. Prior Circuit Court Cases and Digital Realty Trust, Inc. v. Somers

In 2013, the Court of Appeals for the Fifth Circuit was first presented with the issue of whether an internal reporter qualified for whistleblower protection under the Dodd-Frank Act.[4] In *Asadi v. G.E. Energy (USA)*, Asadi, GE Energy's Iraq Country Executive made internal reports after he became concerned that another GE Energy employee was hired to curry favor with an Iraqi official as part of a lucrative business deal in violation of the Foreign Corrupt Practices Act.[5] Asadi was fired soon after, and he subsequently filed a complaint stating that GE Energy violated the Dodd-Frank Act's whistleblower anti-retaliation protection by firing him following his internal reports.[6] The Dodd-Frank Act affords anti-retaliation protection to whistleblowers, who are defined in the statute as "any individual who provides . . . information relating to a violation of the securities laws *to the [SEC]*, in a manner established, by rule or regulation, by the [SEC]."[7] The Fifth Circuit Court found this language to be clear on its face and

[4] Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013).
[5] *Id*. at 621. *See* 15 U.S.C. § 78dd (1)–(3), 78ff (2012).
[6] *Asadi*, 720 F.3d at 621 (stating that Asadi was fired "approximately one year after he made the internal reports" and that he eventually filed a lawsuit alleging that GE Energy violated the Doff-Frank Act's whistleblower protection provision).
[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6 (2012) (alteration in original) (emphasis added).

precluded internal reporters from Dodd-Frank's Act anti-retaliation protection.[8]

While the Dodd-Frank Act's definition of a whistleblower seems to preclude reporters that only reported internally, the SEC's own interpretation, put forth in a promulgated rule,[9] expands the range of persons encompassed in this definition by explicitly distinguishing between those seeking an award and those seeking anti-retaliation protection. According to the SEC, under the Dodd-Frank Act, only those who reported to the SEC are qualified for the whistleblower award.[10] However, one does not need to report to the SEC to qualify for whistleblower protection against retaliation.[11] Indeed, one may receive protection from retaliation as long as the alleged misconduct has been disclosed in the manner described by reporting to the SEC in accordance with the Dodd Frank Act's section on protection against retaliation or by complying with any of the other statutes referenced in that section.[12] One of the statutes referenced by the Dodd-Frank Act is the SOX Act,[13] which protects whistleblowers from retaliation even if their reporting is solely internal (more on the differences between the Dodd-Frank Act and SOX Act below).[14] Thus, under the SEC's rule, one is eligible for whistleblower protection against retaliation under the Dodd-Frank Act based on internal reports alone.

A different outcome arose in 2015, when the Court of Appeals for the Second Circuit faced the same issue in *Berman v.*

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[8] *Asadi*, 720 F.3d at 630 ("The statute, therefore, clearly expresses Congress's intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank.").

[9] 17 C.F.R. § 240.21F-2 (2018) ("To be eligible for an award, you must submit original information to the Commission . . . . The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.").

[10] *Id.*

[11] *Id.* ("The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.")

[12] *Id.* ("[Y]ou are a whistleblower if . . . [y]ou provide that information in a manner described in . . . 15 U.S.C. § 78u-6(h)(1)(A).").

[13] 15 U.S.C. § 78u-6 (2012) ("No employer may discharge . . . a whistle-blower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.").

[14] 18 U.S.C. § 1514A (2012) (stating that an employee may not be discharged or in any other manner be discriminated against for reporting information regarding any employer conduct which the employee reasonably believes is in violation of federal securities law).

Neo@Ogilvy.[15] Berman was the finance director at *Neo@Ogilvy*, a digital and direct media services corporation, and oversaw all the accounting practices of the corporation.[16] He made an internal report after discovering evidence of accounting fraud and was soon after terminated.[17] The Second Circuit found the plain language of Dodd-Frank Act to be ambiguous[18] because the definition for whistleblowers called for reporting to the SEC but also appeared to extend the definition beyond the explicit terms by referencing the SOX Act.[19] Upon determination that the plain language and legislative history of the Dodd-Frank Act was ambiguous concerning whether internal reporters are to be afforded anti-retaliation protection, the Second Circuit Court held that it was appropriate to apply *Chevron* deference[20] when addressing the SEC's rule.[21] The Second Circuit accordingly determined that the internal reporters, despite not having reported to the SEC, were entitled to pursue anti-retaliation remedies under the Dodd-Frank Act.[22]

In 2017, the Court of Appeals for the Ninth Circuit also decided on an expanded definition of whistleblowers in *Somers v. Digital Realty Trust*.[23] Somers, while serving as Vice President of Digital

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[15] Berman v. Neo@Ogilvy, 801 F.3d 145 (2d Cir. 2015) (holding that despite not having reported the SEC before his termination, Berman is entitled to pursue Dodd-Frank remedies for alleged retaliation after his report).
[16] *Id*. at 148–49.
[17] *Id*.
[18] *Id*. at 154 (finding that "a far larger number of district courts have deemed the statute ambiguous and deferred to the SEC's rule").
[19] *Id.* at 152 ("Like auditors, attorneys would gain little, if any, Dodd-Frank protection if subdivision (iii), despite cross-referencing Sarbanes-Oxley provisions protecting lawyers, protected only against retaliation for reporting to the Commission.").
[20] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[21] *Id*. at 155 ("[T]he tension between the definition in subsection 21F(a)(6) and the limited protection provided by subdivision (iii) of subsection 21F(h)(1)(A) if it is subject to that definition renders section 21F as a whole sufficiently ambiguous to oblige us to give Chevron deference to the reasonable interpretation of the agency charged with administering the statute . . . .").
[22] *Berman*, 801 F.3d at 155 ("[T]he tension [within the statute] renders section 21F as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute.").
[23] Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045 (9th Cir. 2017) (affirming the lower court's decision to apply the *Chevron* standard adopted by the Second Circuit in *Berman*).

Realty Trust, made internal reports concerning potential securities law violations by the corporation and was fired soon after.[24] The Ninth Circuit acknowledged the then existing circuit disagreement and determined that the Dodd-Frank Act affords anti-retaliation protection for internal reporters.[25] Although its decision followed that of the Second Circuit Court, the Ninth Circuit Court did not explicitly apply *Chevron* deference.[26] Instead, the Ninth Circuit reasoned that a strict definition of whistleblower would render Dodd-Frank Act's reference[27] to shielding protected acts under the SOX Act superfluous.[28]

However, on appeal, the Supreme Court overturned the Ninth Circuit's decision. The Supreme Court decided in *Digital Realty Trust, Inc. v. Somers* that the Dodd-Frank Act's anti-retaliation protection only extends to those reporting to the SEC.[29] The Supreme Court determined that Congress's "core objective" in passing the Dodd-Frank Act was to encourage employees with knowledge of securities law violations or fraudulent practices to "tell the SEC."[30] The Dodd-Frank Act's definition of whistleblower and its SEC reporting requirement therefore clearly precludes internal reporters from anti-retaliation protection.[31]

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[24] *Id*. at 1047 ("[Somers]" made several reports to senior management regarding possible securities law violations by the company, soon after which the company fired him. Somers was not able to report his concerns to the SEC before Digital Realty terminated his employment.").

[25] *Id.* at 1050 (comparing the Second Circuit's decision in *Berman* with the Fifth Circuit's decision in *Asadi*).

[26] *Id.* at 1050–51 (agreeing with the Second Circuit, but relying on congressional intent to define the extent of protections).

[27] 15 U.S.C. § 78u-6(h)(1)(A) (2012) ("No employer may discharge . . . a whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.").

[28] *Somers*, 850 F.3d at 1049–51.

[29] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772–73 (2018) (holding that a report to the SEC is a requirement to sue under Dodd-Franks anti-retaliation provision).

[30] *Id*. at 777 ("The Court's understanding is corroborated by Dodd-Frank's purpose and design.").

[31] *Id*. at 778 (concluding that the plaintiff in this case did not fall under the Dodd-Frank anti-retaliation provision since he did not fall under the statutory definition of "whistle-blower").

B. Dodd-Frank Act's Protection for Whistleblowers and Internal Reporters

After the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, the Dodd-Frank Act no longer protects employees who only report securities law violations or fraudulent practices internally.[32] This means internal reporters no longer have an anti-retaliation protection claim under the Dodd-Frank Act. One may argue that internal reporters may still seek protection under the SOX Act even if protection under the Dodd-Frank Act is no longer available. However, as will be shown below, internal reporters lose significant protection against anti-retaliation without the Dodd-Frank Act. Section IIB and the following Section IIC will explain the differences between the two Acts and why an internal reporter, if afforded the choice, will chose to bring a claim under the Dodd-Frank Act over the SOX Act.

The Dodd-Frank Act is a complex piece of legislation passed in response to the Great Recession of 2008.[33] In line with its primary aims of preventing future collapses of significant financial institutions and protecting consumers, the Dodd-Frank Act includes a whistleblower anti-retaliation protection and incentive program.[34] The whistleblower incentive program adds the possibility of awarding the whistleblower ten to thirty percent of the collected sanction if the SEC's ensuing enforcement action collects over $1 million dollars in sanctions.[35] The SEC has awarded approximately $160 million to forty-six whistleblowers since the passage of the provision,[36] with $50 million dollars going to twelve individuals in fiscal year 2017 alone.[37] However, the SEC only extends this award to whistleblowers as defined in the Dodd-Frank Act (i.e., those who report to the SEC).[38]

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[32] *See id.*

[33] Mark Koba, *Dodd-Frank Act: CNBC Explains*, CNBC (May 11, 2012, 4:01 PM), https://www.cnbc.com/id/47075854 [https://perma.cc/Q9VP-BAN3] ("The term Dodd-Frank refers to a comprehensive and complicated piece of financial regulation born out of the Great Recession of 2008.").

[34] 15 U.S.C. § 78u-6 (2012).

[35] *Id.*

[36] U.S. SEC. & EXCH. COMM'N, 2017 ANNUAL REPORT TO CONGRESS WHISTLEBLOWER PROGRAM 16 ("Since program inception, the Commission has issued awards of approximately $160 million to 46 individuals.").

[37] *Id*. at 10 ("In FY 2017, the Commission ordered whistleblower awards of nearly $50 million to 12 individuals.").

[38] 17 C.F.R. § 240.21F-2 (2018).

For internal reporters, at least before the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, the Dodd-Frank Act nevertheless offered anti-retaliation protection. While the anti-retaliation protection under the Dodd-Frank Act seems to overlap with the SOX Act, there are many substantive and procedural differences that make the Dodd-Frank Act the more attractive option. The Dodd-Frank Act allows a claimant to file immediately in a district court of the United States, has a longer statute of limitations, and affords a successful claimant great damages.[39] The Dodd-Frank Act allows a claimant to file immediately in a district court of the United States, has a longer statute of limitations, and affords a successful claimant great damages.[40]

Under the Dodd-Frank Act, a claimant may immediately bring an action alleging discriminatory or retaliatory conduct in a district court of the United States.[41] The SOX Act requires a claimant to file with the Secretary of Labor first.[42] Only if the Department of Labor fails to issue a final decision within 180 days or upon appeal of the Department of Labor's final decision can the claimant proceed to federal court.[43] Section IIC below further discusses why claims made under the SOX Act often fail even if they make it to federal court.

The two acts also provide different statutes of limitation. The Dodd-Frank Act allows for a claim as long as it is brought less than six years after the date on which the alleged securities violation or fraud occurred or less than three years after the date which material facts related to the alleged securities violation or fraud are known or reasonably should have been known by the claimant.[44] Under the SOX Act, a claimant has to make a claim no later than 180 days after the date on which the alleged securities violation or fraud occurred or the date on which the employee became aware of such violation or fraud.[45] This is

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[39] *See* Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1050 (9th Cir. 2017) ("The Fifth Circuit pointed out that Sarbanes-Oxley lacks DFA's double damage provision, has a shorter statute of limitations, and has more extensive administrative requirements.")

[40] *Id*.

[41] 15 U.S.C. § 78u-6(h)(1)(b)(i) (2012) ("An individual who alleges discharge or other discrimination . . . may bring an action under this subsection in the appropriate district court of the United States . . . .").

[42] 18 U.S.C. § 1514A(b)(1)(A) (2012).

[43] *Id*.

[44] 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012).

[45] 18 U.S.C. § 1514A(b)(2)(D) (2012).

a significant difference in terms of how much time a claimant has to prepare and file a claim.

The Dodd-Frank Act and the SOX Act also provide for different potential damage awards for a successful claimant. Under the Dodd-Frank Act, a successful claimant (i) shall be reinstated with the same seniority status the individual would have had but for the employer's violation; (ii) shall receive double the amount of back pay plus interest; and (iii) shall be compensated for litigation costs and other reasonable fees.[46] The SOX Act allows a successful claimant to be reinstated in the former position of employment, back pay with interest, and, at the request of the claimant, reasonable costs and fees of litigation.[47] While the SOX Act prescribes similar damages to Dodd-Frank, the differences in specific relief granted to successful claimants could influence the incentives of whistleblowers to file reports under each statute.

C. Sarbanes-Oxley Act's Protection for Whistleblowers and Internal Reporters

Seeing that the Dodd-Frank Act no longer protects internal reporters, the SOX Act has become the only significant source of federal anti-retaliation protection. However, past outcomes of SOX anti-retaliation cases do not look promising for internal reporters.[48] Some have described the SOX Act as providing only an "illusion of protection without truly meaningful opportunities or remedies for achieving

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[46] 15 U.S.C. § 78u-6(h)(1)(C) (2012).
[47] 18 U.S.C. § 1514A(c) (2012).
[48] *See* Beverly Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection under Sarbanes Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 22 (2007) ("Although there is an increasing trend toward removing cases to federal court, victory for employees appears to have been elusive. Six out of a total of 286 complaints resulted in a 'victory' for the employee or only two percent."); *See also* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Wins*, 49 WM. & MARY L. REV. 65, 67 (2007) ("In the first three years of [the SOX Act's] enactment . . . OSHA resolved 361 of these cases and found for employees only 13 times, a win rate of 3.6%.").

it,"[49] and others have discussed the difficult obstacles preventing SOX retaliation claims from even making it to the appellate court level.[50]

Passed in 2002, the SOX Act predates the Dodd-Frank Act in its protection of whistleblowers and internal reporters against retaliation.[51] An internal reporter is explicitly protected under the SOX Act as an employee who reports employer conduct that the employee reasonably believes to be a violation of federal securities law to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)."[52] An employee with a reasonable belief that the employer is in violation of federal securities law is entitled to anti-retaliation protection if they report up internally or report out to the SEC.[53]

If the employee faces retaliation as a result of such reporting, the employee must file with the Secretary of Labor within 180 days after the date on which the alleged violation occurs or on which the employee became aware of the violation.[54] The short period of preparation is followed by an initial review by the Occupational Safety and Health Administration (OSHA) under the Department of Labor.[55] The claimant can proceed to federal court only if the Department of Labor fails to issue a final decision within 180 days or upon appeal of the

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[49] Terry Morehead Dworkin, *Sox and Whistleblowing*, 105 MICH. L. REV. 1757, 1764 (2007).

[50] Megan E. Mowrey et al., *Does Sarbanes-Oxley Protect Whistleblowers—The Recent Experience of Companies and Whistleblowing Workers under SOX*, 1 WM. & MARY BUS. L. REV. 431, 435 (2010) ("Very few cases involving SOX retaliation claims have made it to the appellate courts . . . [due to] [t]he courts' general failure to classify the actions of an employee as protected conduct.").

[51] Stephen M. Kohn, *Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers*, NAT'L WHISTLEBLOWER CTR., https://www.whistleblowers.org/index.php?option=com_content&task=view&id=27 [https://perma.cc/QL7L-VM3K].

[52] 18 U.S.C. § 1514A(a)(1)(C) (2012).

[53] *Id.* § 1514A(a)(1) (providing whistleblower protection to those who report to a federal regulatory or law enforcement agency or a person with supervisory authority).

[54] *Id.* § 1514A(b)(2)(D).

[55] U.S. DEP'T OF LABOR, THE OCCUPATIONAL SAFETY AND HEALTH ADMIN., CPL 02-03-007, WHISTLEBLOWER INVESTIGATIONS MANUAL (2016) (outlining the preliminary conduct of the investigation).

Department of Labor's final decision.[56] "Almost without exception, both critics and supporters of employee rights acknowledge the employee-friendly nature of Sarbanes-Oxley [Act] . . . however, the Act fails to produce corresponding employee victories."[57]

Statistically, the chances that a claimant will prevail is below four percent.[58] As this statistic only takes into an account cases where an administrative decision was reached, it does not provide a complete representation of a claimant's chances of success.[59] For example, it could very well be that many claims reach a settlement in favor of the claimants. However, the most likely outcome by far is a determination favorable to the employer, followed by an employee withdrawing the claim.[60]

One of the most publicized[61] SOX retaliation claim cases is *Welch v. Cardinal Bankshares*.[62] Welch was the Chief Financial Officer (CFO) of Cardinal Bankshares when he was fired in October 2002 after making internal reports regarding bad accounting practices in violation of Generally Accepted Accounting Principles (GAAP).[63] After Welch filed a claim with the Department of Labor, OSHA found for Cardinal Bankshares, stating that the corporation had cause to fire Welch. Upon appeal to a Department of Labor administrative law judge (ALJ), Welch received a favorable preliminary order for reinstatement to his former position. Cardinal Bankshares appealed the ALJ's decision of reinstatement to the Department of Labor Administrative Review Board (ARB) in January 2004.[64] Cardinal Bankshares refused to reinstate Welch, which led Welch to file an enforcement

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[56] 18 U.S.C. § 1514A(b)(1) (2012) (limiting review in U.S. District court to when the Secretary of Labor has not issued a final decision with 180 days of the filing of the complaint).
[57] Moberly, *supra* note 48, at 94–95.
[58] *Id*. at 93.
[59] *Id.* at 95.
[60] *See id.* at 96 (showing that employer's win OSHA claims 70.9% of the time, followed by employee withdrawals at 14.7% of the time).
[61] *See*, *e.g.,* Deborah Solomon, *For Financial Whistleblowers, New Shield Is an Imperfect One*, WALL ST. J. (Oct. 4, 2004, 12:01 AM), https://www.wsj.com/articles/SB109684145991934717 (discussing the *Welch* case as "[a]mong the first" claims to be brought under SOX).
[62] Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006) (rejecting Welch's petition to enforce the order of reinstatement from the administrative proceeding below due to lack of jurisdiction).
[63] Solomon, *supra* note 61.
[64] Dworkin, *supra* note 49, at 1765.

action in federal district court in October 2006. The district court dismissed the case on lack of subject matter jurisdiction to enforce a preliminary order, as it only has jurisdiction over final orders.[65] Finally, in May 2007, the ARB dismissed the ALJ's preliminary order of reinstatement because reporting violations of GAAP was not a protected activity under the SOX Act.[66] Welch's final appeal to the Fourth Circuit Court ended unsuccessfully in 2009.[67] About six years after his initial dismissal, Welch finally received a definitive, though probably disappointing, answer to his initial complaint. By 2004, Welch had already drained his family's retirement savings and spent over $90,000 in legal fees.[68] While unusual in its complex procedural history, Welch is not alone in failing to receive anti-retaliation protection under the SOX Act.[69]

Even though the SOX Act remains a viable source of federal anti-retaliation protection for internal whistleblowers after the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, the path to success is paved with many substantive and procedural hurdles.

III. Can a Revised Dodd-Frank Adequately Protect Internal Reporters?

The preceding section sought to demonstrate that the Dodd-Frank Act can, in theory, provide internal reporters with better anti-retaliation protection than the SOX Act. However, in light of the Supreme Court's decision in *Digital Realty Trust*, internal reporters are no longer eligible to seek protection against retaliation under the Dodd-Frank Act.[70] Some scholars have suggested amendments to the

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[65] *Welch*, 454 F. Supp. 2d at 559.

[66] Welch v. Cardinal Bankshares Corp., ARB Case 05-064, 2007 WL 2746929 at *9 (U.S. Dep't of Labor May 31, 2007) (concluding that Welch's interpretation of SOX Act's whistleblower protections conflicts directly with congressional intent).

[67] *See* Welch v. Chao, 536 F.3d 269, 278-79 (4th Cir. 2008) (upholding the ARB's dismissal on the basis that Welch failed to show how Cardinal Bankshares' alleged conduct could reasonably be regarded as violating any of the laws listed in the SOX Act).

[68] Solomon, *supra* note 61.

[69] *See* Mowrey et al., *supra* note 50 (discussing the many substantive hurdles faced by those that bring a SOX Act retaliation claim due to stringent interpretation of what is protected activity under the SOX Act).

[70] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018) (holding the Dodd-Frank Act whistleblower provisions do not apply to internal reporters).

existing Dodd-Frank Act in order to continue protecting internal reporters; two such suggestions are discussed below. While these are clever suggestions, reforming the Dodd-Frank Act to explicitly protect internal reporters does not coincide with the purpose of the Dodd-Frank whistleblower program to encourage reporting out to the SEC.[71]

One suggestion is to change the definition of whistleblower in the Dodd-Frank Act.[72] As it stands, the Dodd-Frank Act defines whistleblowers as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[73] The suggested change alters the definition in the following manner: "The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A))*."[74] This suggestion makes internal reporters eligible for protection because section 21(F)(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)) references the SOX Act, which protects internal reporters against retaliation.[75]

Another suggestion is to modify U.S.C. 78u-6(h)(1)(A) directly by substituting "whistleblower" for "employee" in the following manner:

> (h) Protection of whistleblowers
>
> (1) Prohibition against retaliation
>
> (A) In general No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a ~~whistleblower~~ *employee* in the terms and condi-

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[71] CHRISTOPHER J. DODD, THE RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010, S. REP. NO. 111-176, at 38 (2010) (stating that the SEC would benefit most from "a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC").

[72] Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing under the Shadow of Dodd-Frank*, 73 ADMIN L. REV. 673, 695–96.

[73] 15 U.S.C. § 78u-6(a)(6) (2012).

[74] Shaw, *supra* note 72, at 709–10.

[75] 15 U.S.C. § 78u-6(h)(1)(A) (2012) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.").

> tions of employment because of any lawful act done by the ~~whistleblower~~ *employee*—
> (i) in providing information to the Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 . . . .[76]

This substitution expands protection from retaliation to all employees regardless of whether they are internal reporters of whistleblowers.

Even without considering the logistical difficulties in passing an amendment, these two suggestions do not take into account Dodd-Frank's purpose of encouraging reporting to the SEC.[77] While the Dodd-Frank Act may in theory protect internal reporters, its purpose and plain-text language[78] indicate that it only protects those who provide information *to the SEC*. As the Supreme Court stated in *Digital Realty Trust*,

> Dodd-Frank's text and purpose leave no doubt that the term "whistleblower" in §78u-6(h) carries the meaning set forth in the section's definitional provision. The disposition of this case is therefore evident: Somers did not provide information "to the Commission" before his termination, §78u-6(a)(6), so he did not qualify as a "whistleblower" at the time of the alleged retaliation. He is therefore ineligible to seek relief under §78u-6(h).[79]

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[76] Matt Reeder, *Proceeding Legally: Clarifying the SEC/Dodd-Frank Whistleblower Incentives*, 7 HARV. BUS. L. REV. 269, 312 (2017).
[77] DODD, *supra* note 71.
[78] 15 U.S.C. § 78u-6(a)(6) (2012) ("The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws ***to the Commission***, in a manner established, by rule or regulation, by the Commission." (emphasis added)).
[79] *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018).

IV. Making the Case for Internal Reporting and Protecting Internal Reporters

At this point one may wonder: why not just encourage internal reporters to *also* report to the SEC and thus place themselves within the protection of the Dodd-Frank Act? If the SOX Act is dated and provides only illusory protection, an internal reporter can report out to the SEC instead and have much more success in a potential retaliation claim under the Dodd-Frank Act. Internal reporting, as a practice, is not new; in a 2002 speech, former SEC Commissioner, Cynthia Glassman emphasized the importance of an independent officer in charge of corporate compliance and addressing internal reports.[80] In particular, the independent officer should be in possession of the following qualities:

> He or she should have sufficient seniority and authority to take the actions necessary under the circumstances. To assess whether your corporate responsibility officer meets this requirement, ask yourself if the person would be able to address the worst-case scenario.
>
> The position should have the full support of the CEO and senior management, both in theory and in practice. The corporate responsibility officer should have access and provide regular reports to senior management. In this regard, he or she can play an important role in helping a company meet the information gathering and reporting requirements contained in the Commission's new internal control and certification rules.
>
> Although regular board reports on compliance and controls seem advisable, even if they do not occur regularly, the corporate responsibility officer should have the ability to report directly to the board (for example, to the audit committee chairman) on matters of significant import to the company or matters involving misconduct by senior management.

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[80] *See* Cynthia A. Glassman, Commissioner, U.S. Sec. & Exch. Comm'n, Address at the American Society of Corporate Secretaries (Sept. 27, 2002).

> In addition, the responsible officer should have sufficient time and adequate resources to implement the company's corporate responsibility program in an effective manner. The best written code of ethics will be worthless if the company starves the budget of the officer who has to implement it.[81]

This section aims to show that internal reporting, by itself, is an essential business practice that is mutually-desired for both the employee and employer in question. While SEC enforcement actions may effectively bring a stop to company securities law violations or fraudulent practices, if the violation is unintentional or perpetuated by a select few, internal reporting should be the desired first step. If internal reporting is the mutually-desired first step, internal reporters are just as deserving of adequate anti-retaliation protection as whistleblowers.

A. The Employer's Incentive to Encourage Internal Reporting

Obvious reasons exist for why an employer would find internal reporting of the company's securities law violations or fraudulent practices more attractive than reporting out to the SEC.[82] An SEC enforcement action not only will result in monetary damages paid out from business profits but will also cause significant damages to the company's reputation externally and internally.[83] Potential business partners and customers would rather steer clear of a corporation that was found in violation of federal securities law lest they fall victim to such securities law violations or fraudulent practices.[84] Employees,

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[81] *Id.* ("In terms of trying to personify the corporate conscience, there is something not specifically required, but which I feel is essential nonetheless . . . . [A] company should have an officer with ownership of corporate compliance and ethics issues . . . .").

[82] *See*, *e.g.*, Mark Pastin, *Why Embracing Whistleblowers Could Save Your Reputation*, GLOBE & MAIL (May 12, 2018), https://www.theglobeandmail.com/report-on-business/careers/leadership-lab/why-embracing-whistleblowers-could-save-your-reputation/article17858924 [https://perma.cc/CY8F-3ZFE].

[83] *Id.*

[84] *See*, *e.g.*, Jackie Watt, *Tesla 'Whistleblower' Tells SEC Company Misled Investors and Put Customers at Risk*, CNN MONEY (July 12, 2018, 1:48 PM), https://money.cnn.com/2018/07/11/news/companies/tesla-sec-tip/index.html [https://perma.cc/5CKK-JKFD].

fearing that their company may no longer provide them with a stable work environment or that they may be personally implicated in any matters, may try to leave a company facing charges.[85] To mitigate the monetary and reputational losses that may result from a potential enforcement action, and to signal to the public that it is committed to conducting business responsibly, companies often choose to have a robust internal reporting system in place.[86] Rather than perceiving a system of internal reporting as giving companies an opportunity to "hush up" securities law violations or fraudulent practices, such a robust internal reporting system can help stop such violations effectively as well as build trust and confidence throughout the company.

A robust internal reporting system should aim to establish a clear channel for reporting potential securities law violations or fraudulent practices while providing protection for internal reporters. Some common techniques seen at the workplace include anonymous feedback polling or refresher meetings on the corporation's "open-door" policy.[87] However, how can employers really make sure that there is a clear channel of internal reporting?

In a 2016 study, some experts suggested that the two main obstacles affecting the success of an internal reporting system are fear of retaliation and a sense of futility.[88] One interesting perspective raised by this article on anonymity is that while anonymity in an internal reporting system is seen as a way to protect employees from potential retaliation, it may actually reinforce the fear that speaking up will result in retaliation.[89] A practice of anonymity may subconsciously send the message that it is not safe to speak up about potential

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[85] *See* Pastin, *supra* note 82 (providing many strategies for ensuring that employees do not experience this fear).

[86] *Id.* (remarking on the costs of whistleblowers taking issues public including "settlements with legal authorities that run into tens of millions of dollars, expensive civil litigation, and damage to a good corporate reputation" and concluding "if you learn to love your inside whistleblowers, you are much less likely to have outside whistleblowers").

[87] James R. Detert & Ethan R. Burris, *Can Your Employees Really Speak Freely?*, HARV. BUS. REV., Jan.–Feb. 2016, at 82 (describing different forms of internal reporting channels).

[88] *Id*. (citing the two main obstacles as "a fear of consequences (embarrassment, isolation, low performance ratings, lost promotions, and even firing) and a sense of futility (the belief that saying something won't make a difference, so why bother?)").

[89] *Id*. ("[A]llowing employees to remain unidentified actually underscores the risks of speaking up—and reinforces people's fears.").

securities law violations or fraudulent practices.[90] The article recommends that employers make feedback a casual and frequent exchange between supervisors and employees in a corporation.[91]

While this study raises interesting points and fresh perspectives on how a corporation should improve the effectiveness of its internal reporting system, its concluding advice still does not give clear instructions on how to maintain a robust reporting system. There is no one size fits all plan for all companies, and it is up to the individual corporation to discover how to implement recommended best practices through trial and error. However, as Section V below will show, there are certain personnel and steps all companies should have in place to ensure that their internal reporting system can live up to its promise of efficiency and anti-retaliation protection for internal reporters.[92]

B. The Employee's Incentives in Participating in Internal Reporting

When faced with a potential corporate violation, an employee may choose to keep silent or speak up. An employee may choose to keep silent due to fear of repercussions or a sense of futility, but sometimes the consequences of remaining silent may be even more dire.[93] If the employee chooses to speak up, that individual then faces the choice of reporting up internally or reporting out and becoming a whistleblower. One incentive to become a whistleblower may be the potential award. While the whistleblower award available under the Dodd-Frank Act may make reporting out to the SEC somewhat attractive, the chances of the award is slim: of the 4,400 tips the SEC received in

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[90] *Id.* ("Getting the ideas you want and need from your employees will always be a challenge.").

[91] *Id*. at 85 ("If you ask for input frequently and hold the conversations face-to-face, idea sharing will feel less ominous and more natural.").

[92] *See* Glassman, *supra* note 80 ("While every company must assess its particular needs based on the size and nature of its business, there are several characteristics that I would want the corporate responsibility officer to have if I were relying on this person . . . have sufficient seniority and authority . . . have the full support of the CEO and senior management . . . have the ability to directly report to the board . . . [and] have sufficient time and adequate resources to implement the company's corporate responsibility program . . . .").

[93] Amy Gallo, *How To Speak Up About Ethical Issues At Work?,* HARV. BUS. REV. (June 4, 2015), https://hbr.org/2015/06/how-to-speak-up-about-ethical-issues-at-work (presenting an anecdotal example of when keeping silent resulted in negative consequences).

2017, only twelve whistleblowers ended up receiving money.[94] Since the award is only available if the SEC's ensuing enforcement action collects over $1 million dollars in sanctions,[95] it is not enough that an employee has a viable tip for the SEC. The employee is faced with the near impossible task of figuring out how much the tip is worth to the SEC, or else the employee faces risk of exposure as a whistleblower and no chance of award.

In-house lawyers face a particular incentive against reporting out as a whistleblower. In-house lawyers are in a unique position because they are privy to confidential and sensitive information and are often approached by other employees to consult on whether a certain action may result in negative legal consequences. Yet they may be bound by a duty of confidentiality because such information arose through privileged communications. Per SEC rules, an attorney must first internally report material securities law violations or fraudulent practices to the GC.[96] If the in-house lawyer reasonably believes that the GC has not "provided an appropriate response within a reasonable time," the in-house lawyer must then report up to the full Board of Directors or to an appropriate Board committee.[97] Nowhere in the SEC's rule is an in-house lawyer *required* to report out to the SEC.[98] Despite the duty of confidentiality to the company, an in-house lawyer *may* reveal, in a report to the SEC, the employer's confidential information without consent to the extent the in-house lawyer reasonably believes necessary:

> (i) To prevent the [employer] from committing a material violation that is likely to cause substantial injury to the financial interest or property of the [employer] or investors;
>
> (ii) To prevent the [employer], in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any

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[94] U.S. SEC. & EXCH. COMM'N, *supra* note 36, at 1 ("In FY 2017, we received over 4,400 tips, an increase of nearly 50 percent since FY 2012.").

[95] 15 U.S.C. § 78u-6 (2012) (defining "covered judicial or administrative action" as one brought by the Commission under the securities law that results in monetary sanctions exceeding $1 million).

[96] 17 C.F.R. § 205.3(b) (2018).

[97] *Id*.

[98] *See id.*

act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the [employer] that caused, or may cause, substantial injury to the financial interest or property of the [employer] or investors in the furtherance of which the [in-house lawyer's] services were used.[99]

An in-house lawyer faces a number of decisions before it is permitted to report out under the SEC's rules. First, the in-house lawyer must decide which of the three scenarios in which reporting out is allowed is applicable. If operating under the first scenario, the in-house lawyer has to determine whether an injury to the financial interest or property of the employer is *likely* to occur as a result of the material violation and whether such an injury will be substantial.[100] The second scenario pertains particularly to perjury and fraud against the SEC.[101] If operating under the third scenario, the in-house lawyer must determine if the injury to the financial interest or property of the employer is substantial.[102] Under all three scenarios, there is the additional question of the scope of disclosure because disclosure is allowed only *to the extent* the in-house lawyer reasonably believes is *necessary* to prevent or mitigate one of the three scenarios.[103] As in-house lawyers have a duty of confidentiality to the company and as required by SEC rules, it is more likely that reporting internally is the method of choice for in-house lawyers.

Another incentive against reporting out as a whistleblower is that, for an exposed whistleblower, there still exists a culture against those who report out.[104] Even with protections against retaliation in place, those that choose to blow the whistle often see their personal lives negatively affected and become a pariah in the industry, unable to

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[99] *Id*. § 205.3(d).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *See*, *e.g*., Simone Neville, *Hero or Pariah? A Whistleblower's Dilemma*, GUARDIAN (Nov. 22, 2012, 3:13 PM), https://www.theguardian.com/business/2012/nov/22/whistleblowing-autonomy-hewlett-packard [https://perma.cc/GS6K-SEHM] ("[Reporting out] left him unable to work in banking again, turning to drink and putting a strain on his family life.").

get another job in the same field.[105] Sometimes, it is not even the actions taken by the employer or the industry that ostracizes the employee. Sometimes, even if the employer has looked favorably upon the actions of a whistleblower, fellow employees, acting on their own accord, are still free to create a hostile work environment and force a whistleblower's resignation.

Such a situation arose in the 2014 case *Halliburton, Inc. v. Administrative Review Board.*[106] Anthony Menendez, an account executive working for the energy management corporation Halliburton, submitted an internal report to the corporation's audit committee and an external report to the SEC regarding what he thought were questionable accounting practices used by the corporation.[107] The SEC soon notified Halliburton that it was under investigation.[108] While the SEC kept Menendez's identify confidential, the GC at the time figured out Menendez's identify because, in a violation of Halliburton's corporate policy, the legal department received a copy of Menendez's internal report.[109] It was clear to the GC that Menendez was the one who contacted the SEC and notified the CFO. The CFO then sent a department-wide email indicating that "the SEC has opened an inquiry into the allegations of Mr. Menendez."[110] While the corporation did not take any official action, Menendez's name appearing in that email led to ostracism by his colleagues.[111] He was no longer invited or

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[105] *See*, *e.g.*, Kirsten Korosec, *Ex-Tesla Worker Makes It Official and Blows the Whistle to SEC*, TECH CRUNCH (July 11, 2018), https://techcrunch.com/2018/07/11/ex-tesla-worker-sec-whistleblower [https://perma.cc/F3AR-MH8C] ("'Getting the truth out has become a nightmare. While we have had to relocate due to threats and harassment, both online and offline, making it difficult to press on, my family and I have also received a ton of support, which keeps us going' . . . . .").

[106] 771 F.3d 254 (5th Cir. 2014).

[107] *Id*. at 255 ("Anthony Menendez, . . . used the company's internal procedures to submit a complaint to management about what he thought were 'questionable' accounting practices. Menendez also lodged a complaint . . . with the Securities and Exchange Commission . . . .").

[108] *Id*. at 256.

[109] *Id*. at 257 ("The SEC did not specify who had reported Halliburton's accounting practices, but Cornelison, having seen Menendez's internal complaint, surmised that Menendez must have been the source of the SEC complaint as well.").

[110] *Id*. at 257.

[111] Jesse Eisinger, *The Whistleblowers Tale: How an Accountant Took on-Halliburton*, PROPUBLICA (Apr. 21, 2015, 9:00 AM) https://www.

allowed to attend meetings and was stopped from teaching accounting rules to other lower-level account executives and working with the corporation's hired auditors.[112] People generally avoided Menendez at work, and even those who remained friendly with him were afraid to be seen with him.[113] Even the opinion of the trial court, which ruled in Halliburton's favor but was later overruled by the Circuit Court, stated that "[i]t is not unreasonable that [Menendez's colleagues] would be reticent to communicate with him about the topics being investigated."[114] Menendez resigned soon after.[115] The SEC ultimately did not find any evidence to bring an enforcement action against the corporation,[116] but it seems the fear of being under investigation and scrutiny alone was enough to trigger adverse work place behavior.[117] For example, Menendez panicked when he first received the department-wide email including his name—as if he had been exposed for doing something wrong.[118] It is important that employees feel safe enough to raise concerns over questionable practices, as it forces the employer to audit its own practices. However, if one is more likely to face ostracism for blowing the whistle, any reasonable person would

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propublica.org/article/the-whistleblowers-tale-how-an-accountant-took-on-halliburton [https://perma.cc/KB73-8FQR] ("The repercussions of being outed in the email were immediate. While Halliburton never officially demoted Menendez, it stripped him of responsibilities. He no longer was allowed to come to most meetings. Menendez's job required him to teach lower-level Halliburton accounting executives about the latest accounting rules; those sessions were curtailed. Another of his responsibilities was discussing new accounting rules and interpretations with KPMG, the company's auditor. The firm decided it couldn't communicate with Menendez while the SEC investigation was going on. Colleagues avoided him.").

[112] *Id.*

[113] *Id*. ("Some of his friends at the company stayed loyal but they couldn't be seen with Menendez. He would meet [a co-worker] at a Panera Bread at 6 a.m. or 7 a.m. to get caught up. [His co-worker] was so worried about being seen communicating with Menendez that he changed his name on his phone . . . .").

[114] *Id.*

[115] *Id*. ("With the SEC investigation having come to nothing, Menendez felt he couldn't stay at Halliburton. He was convinced he'd been punished for having blown the whistle.").

[116] Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 257 (5th Cir. 2014) ("On September 19, 2006, the SEC concluded that no enforcement action against Halliburton was recommended.").

[117] *See id.*

[118] Eisinger, *supra* note 111.

be dissuaded from speaking up. Internal reports within the corporation will not be as alarming as a notification of investigation from the SEC and encourages dialogue within the corporation to address concerns.

Internal dialogue will only be effective if there can be a corporate officer whose only responsibility is the corporation's compliance with proper practices. In *Halliburton*, it seems the GC was tasked with both the duties of legal counsel and compliance officer.[119] While the two duties should, in theory, go hand-in-hand, in reality, the legal counsel's duty to act in the best interest of the corporation may conflict with the compliance officer's duty to ensuring proper compliance. Interest of the corporation may sometimes trump accountability to the public. Even though Halliburton's policy was that "'[employees] can report [their] concerns anonymously or confidentiality' and '[their] confidentiality shall be maintained,'"[120] Halliburton's GC revealed Menendez's name in what one hopes to be a careless oversight.[121] When faced with a SEC notification of investigation, the GC will prioritize the duty to act in the best interest of the corporation. This most likely means that the GC will reveal as little information as possible and quietly settle (or get rid of) the whistleblower's concerns. As one can see from *Halliburton*, an independent compliance officer, who can ensure proper compliance and protect employees involved in external investigation, is an often missing but much needed position.

V. Creating Anti-Retaliation Protection for Internal Reporters from Within

Internal reporting is a desired practice for both employers and employees. The previous section aimed to demonstrate that both employers and employees are incentivized to promote internal reporting over whistleblowing. Even if the Supreme Court has foreclosed anti-retaliation protection for employees that only report internally under the Dodd-Frank Act after *Digital Realty Trust v. Somers*, employers can create their own regulatory structures from within to protect and encourage internal reporting. "Evidence suggests that

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[119] *See Halliburton*, 771 F.3d at 256.
[120] *Id.*
[121] *Id*. ("[The GC], having seen Menendez's internal complaint, surmised that Menendez must have been the source of the SEC complaint as well . . . . He sent an email to Menendez's boss, McCollum, and others, instructing them to preserve documents relevant to the SEC's investigation, as directed, because 'the SEC has opened an inquiry into the allegations of Mr. Menendez.'").

companies that do not employ meaningful governance procedures can pay a significant risk premium when competing for scarce capital in the public markets. In a recent student, for example, three-quarters of the institutional investors surveyed were willing to pay a substantial premium for shares of companies that adopted good governance practices, and conversely more than sixty percent might avoid investing in individual companies based on governance concerns."[122] Good corporate governance and self-regulation may seem like just an additional cost on the company balance sheet but it brings about invaluable long term benefits.

A. Role of the Chief Compliance Officer

A structure of self-regulation takes on the aim of protecting the employer and employees who make internal reports by ensuring that reports of potential corporate violations and fraudulent practices are well-addressed and the employees that made those reports are protected. Such a practice will form a virtuous cycle of encouraging internal reports and ridding the company of questionable practices. At the top of such a self-regulatory structure would be the Chief Compliance Officer (CCO), who "would be charged with detecting and preventing corporate violations . . . ."[123] Unlike the GC or other in-house lawyers who are charged with defending the corporation in the event of potential or actual wrongdoing, the CCO would be charged with "avoiding the need to defend the corporation, because it will not have committed any wrong."[124] An executive such as the CCO cannot be knowledgeable of all the operations within a corporation. It will be up to concerned employees to report potential securities law violations or fraudulent practices through a robust internal reporting systems. While the responsibilities of the CCO (i.e., ensuring compliance and addressing such violations) are often carried out by the GC and other in-house lawyers, the following sections argue that the CCO needs to be a bona fide, independent, executive role in order to properly encourage and protect the desired act of internal reporting. As described in

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[122] Glassman, *supra* note 80.
[123] TAMAR FRANKEL, THE LAW OF INSTITUTIONAL SELF-REGULATION (COMPLIANCE) 400 (2018).
[124] *Id*. at 400–01.

detail in Professor Tamar Frankel's book, *The Law of Institutional Self-Regulation*:[125]

> Compliance is similar to modern quality management: be 'right the first time,' rather than catch and correct errors. In compliance you need to take preventive actions, 'designing and implementing preventive systems.' In enforcement actions that present failure to supervise, 'waiting for problems' is not an adequate approach. Both quality management and compliance must focus on becoming an integral part of the institution's routine and everyday operations . . . . 'Education, training, and awareness are key elements.'

B. Three Ways a Chief Compliance Officer Can Exist within a Corporation

There are three possible ways for a CCO to exist within a corporate structure:[126]

1. One individual assumes both the role of CCO and GC.
2. The CCO and GC are independent positions and the CCO reports to the GC.
3. The CCO and GC are independent positions and exist as equals in the corporate structure.

Halliburton exhibits the inherent weakness of the first option.[127] While this is the most economical option, the duty of the GC to act in the best interest of the corporation may inadequately protect internal reporting agents, discourage internal reporting of questionable

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[125] *Id.* at 413 (quoting John H. Walsh, Chief Counsel of Office of Compliance Inspections and Examinations, U.S. SEC, Address at the NRS Symposium on the Compliance Profession (Apr. 11, 2002)).

[126] José A. Tabuena, *The Chief Compliance Officer vs the General Counsel: Friend or Foe?*, SOC'Y CORP. ETHICS 7 (Dec. 2006), https://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2008/601-3.pdf [https://perma.cc/A8A4-29F3] ("Both the chief compliance officer (CCO) and the general counsel (GC) or chief legal officer perform crucial and related compliance functions for their organization . . . .").

[127] Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 254 (5th Cir. 2014) (detailing the role of the GC as legal counselor and compliance officer).

corporate practices, and ultimately result in shielding bad corporate practices.[128] This is not to suggest that the GC and other in-house lawyers purposefully shield bad corporate practices; however, it is useful to have another compliance check point. The GC and in-house lawyers are privy to sensitive and confidential information and are more likely to be confronted with information concerning a potential corporate violation, which means they may often be in a position to engage in internal reporting. When such a scenario arises, the GC or in-house lawyer would still be representing the company's interests in its role as counsel. Depending on the nature of a violation and the attitude of upper management, a GC acting as a CCO may feel that the ability to act in either capacity is constrained by the respective (and potentially conflicting) duties of the two roles. When the internal reporter is an employee in another department, the GC and in-house lawyers may face similar role confusion. Conversely, a separate CCO allows a designated third-party investigator to look into potential securities law violations or fraudulent practices and allows the GC and in-house lawyer to act fully in the capacity of the company's counsel. It should be noted that the CCO, as a corporate officer, also has a fiduciary duty to the company. However, as the SEC has suggested, the CCO also has a duty to ensure corporate compliance and protect the public.[129]

The second option, in which a CCO reports to the GC, presents similar issues. The federal government raised such concerns when it charged HSBC Bank for failing to maintain an effective anti-money laundering program in accordance with the Bank Secrecy Act.[130] The U.S. cited three reasons for the failure of HSBC Bank's anti-money laundering program: most importantly, HSBC's compliance officers lacked authority to implement corrective actions; HSBC also did not supply adequate personnel and resources to ensure proper compliance; and HSBC had a corporate culture that discouraged

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[128] Tabuena, *supra* note 126, at 10 ("[G]overnment regulators are concerned that the professional role of the GC can serve as a shield to limit government access to information.").

[129] *See* Glassman, *supra* note 80 ("Put bluntly, those who act on behalf of a corporation—its officers, directors, and employees—*must* be its conscience.").

[130] United States v. HSBC Bank USA, No. 12–CR–763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013) ("[T]he government filed an Information charging HSBC with . . . willfully failing to maintain an effective anti-money laundering ('AML') program.").

sharing information and raising concerns over questionable practices within the corporation.[131]

The third option, a separate and independent CCO, is the most effective way to encourage internal reporting and compliance. It is difficult to fully separate the responsibilities of the CCO and the GC because both enforce the corporation's compliance program and protect the company from securities law violations and fraudulent practices.[132] It is important to establish both roles on equal grounds and to foster open communications and effective coordination.[133] "Parity of status and reporting structures in [sic] the best way to foster mutual respect, trust and teamwork between the individuals who hold these positions . . . ensuring that appropriate levels of coordination occur while at the same time maintaining a needed level of separation to avoid potential conflicts."[134] But the GC and the CCO may take the lead in different responsibilities. Most importantly, the CCO may take on the responsibility of leading any investigations to inquire into internal reports of potential violations, allowing the GC to act fully in the capacity as the company's counsel.

C. Current Landscape of Corporate Compliance

There has been a growing trend of separating compliance from legal.[135] For instance, following HSBC's compliance violations, JP Morgan Chase instated a new CCO and reorganized its corporate

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[131] *Id.* at *9 ("The government identifies three major causes for the failures in HSBC's AML and sanctionsprograms [sic].").

[132] J. Reginald Hill et al., The Relationship between the Compliance Officer, In-House Counsel, and Outside Counsel: An Essential Partnership for Managing and Mitigating Regulatory Risk, Address at the American Health Lawyers Association Fraud and Compliance Forum (Oct. 7, 2014) ("Both must make business decisions relating to how the compliance program operates, both must understand and measure the company's compliance risks, and both have a hand in ensuring the company is protected from compliance risks.").

[133] *Id.* ("General counsel and the chief compliance officer must have a synergistic relationship with open communication channels.").

[134] *Id*.

[135] *See* PricewaterhouseCoopers Publications, *The C-Suite Star of 2025: The Surprising Truth about the Chief Compliance Officer of the Future* (Sept. 2015), https://www.pwc.com/us/en/services/alliances/ethisphere/csuite-2025.html [https://perma.cc/8E73-PEGN] (describing the changing nature of the position of Chief Compliance Officer).

structure so the CCO position will no longer be subordinate to the GC.[136] Other financial corporate giants that have since separated and elevated their CCOs include HSBC, Goldman Sachs, and Barclays.[137] "Once thought of as an unfortunately necessary offshoot of the legal department, CCOs are enjoying considerable autonomy as companies nationwide confront a bewildering thicket of regulatory activity and corporate integrity issues."[138] Evidently, CCOs have been hard at work and two have even received whistleblower awards from the SEC.[139] CCOs and other compliance officers, like any other employee within a corporate structure, should feel empowered to report out. In fact, the CCO is in the ideal position to evaluate internal concerns and lead any external investigations. However, should the compliance officer be allowed to participate in the SEC whistleblower award program? There may exist a good argument to exclude the CCOs and other compliance officers from collecting awards. CCOs will be charged with a large volume of sensitive compliance issues and eligibility to claim an

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[136] Donna Boehme & Michael Volkov, *JPMorgan Chase Takes a Giant Step on CCO Independence*, CORP. COUNSEL (Jan. 29, 2013) ("The bank's new CCO, Cynthia Armine, will no longer report to the Legal and Compliance Department of the General Counsel, but instead to the firm's operational co-heads—a structural reorganization that seems to respond to calls from the [compliance and ethics] field for greater CCO independence, line of sight, and seat at the table to empower the CCO.").

[137] John G. Browning, *Why Chief Compliance Officers Are More Important Than Ever*, D MAG. (July–Aug. 2013) ("While it may have taken the weight of government to mandate the separation of the GC and the CCO for some healthcare leaders, four of the biggest players in the banking/financial services field have now separated and promoted their CCOs after years of keeping them under the direct authority of the general counsel: JP Morgan Chase, Goldman Sachs, Barclays, and HSBC.").

[138] *Id*.

[139] *See e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Announces Million-Dollar Whistleblower Award to Compliance Officer (Apr. 22, 2015) ("The Securities and Exchange Commission today announced an award of more than a million dollars to a compliance professional who provided information that assisted the SEC in an enforcement action against the whistleblower's company."); Press Release 2014-180, SEC, SEC Announces $300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company's Wrongdoing (Aug. 29, 2014) ("The Securities and Exchange Commission today announced a whistleblower award of more than $300,000 to a company employee who performed audit and compliance functions and reported wrongdoing to the SEC after the company failed to take action when the employee reported it internally.").

award may present skewed incentives to report out when concerns may be adequately addressed internally.

VI. Conclusion

The Supreme Court, in *Digital Realty Trust v. Somers*, held that employees who only report securities law violations or fraudulent practices internally are not whistleblowers and, therefore, do not qualify for whistleblower anti-retaliation protection under the Dodd-Frank Act.[140] While this decision resolved a previously ongoing circuit split, it has rather disastrous consequences for internal reporters—the Supreme Court has essentially foreclosed anti-retaliation protection for employees that only report internally under the Dodd-Frank Act.

This result, while correct on the basis of a strict textual interpretation, should not be suggested as meaning that employees that only make internal reports are not deserving of anti-retaliation protection. In fact, since both employers and employees are incentivized to promote internal reporting, it is more likely that potential securities violation or fraudulent practices are reported internally. Anti-retaliation protection of internal reporters is no longer found in the existing Dodd-Frank Act, and suggestions to revise the Dodd-Frank Act to protect internal reporters seem likely to come to fruition. However, such protection may potentially be found internally if the employer has a robust system of self-regulation headed by an independent COO. There are, of course, economic and other practical concerns as to why a company may choose to not have a separate CCO, but having an independent CCO to take on the responsibility of leading any investigations to inquire into internal reports of potential violations is an invaluable asset to the company. Not only will the GC will then be able to act fully in the capacity of the company's counsel, but the company would also promote a virtuous cycle of encouraging internal reports and ridding the company of questionable practices.

[140] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).